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Supreme Court, U.S.
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In the

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May an association dedicated to an expressive purpose be compelled to admit as a leader an individual with a manifest opposition to that purpose?

2. May a court dictate to a private expressive organization the details of that organization's expressive purpose?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.[1]

For more than two decades, Pacific Legal Foundation attorneys have been litigating in support of First Amendment rights. *See, e.g., Keller v. State Bar*, 496 U.S. 1 (1990). Pacific Legal Foundation has also participated as a friend of the court in many other First Amendment cases this Court has heard. *See Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, *reh'g denied* (Sept. 12, 1997); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In addition, as a private, nonprofit organization whose mission statement expresses a guiding philosophical purpose (to undertake legal action on behalf of limited government, property rights, and individual rights), Pacific Legal Foundation has an institutional interest in the right of private expressive organizations to define their missions free from government interference.

INTRODUCTION

A writ of certiorari is called for because private expressive associations play a key role in the infrastructure of ordered liberty, and the decision below gravely assaults the independence and viability of such organizations. This case poses the important question of whether government may force a private association organized on a distinct philosophy to alter that philosophy in order to bring it into accord with a governmentally approved line of thinking. Do private

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[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the Amicus Curiae, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. *See* Rule 37.6.

associations with an expressive purpose enjoy the freedom to define for themselves what that purpose is? Can they embrace a defining principle to the point of excluding from membership people who do not share their convictions?

Or, alternatively, may lawmakers tell private expressive associations whom they may or may not admit as members or leaders, regardless of individual candidates' acceptance or rejection of the organization's precepts? And are courts free to superimpose on a private, expressive association a mission purpose, even if it is at odds with the organization's own definition of its purpose and convictions?

The First Amendment provides clear answers to these questions. It denies any power of lawmakers to force on a private expressive association membership policies that conflict with the association's defined purpose. The First Amendment also prohibits courts from making themselves the arbiters of private associations' philosophical tenets and imposing on such an organization an interpretation of its guiding philosophy inconsistent with the organization's own understanding of its mission. In this way, the First Amendment promotes freedom, social betterment, and cultural enrichment by fostering a multitude of private associations with diverse philosophical goals.

STATEMENT OF THE CASE

The Boy Scouts of America (BSA) is a nonprofit, private organization incorporated in 1910. As opposed to being a recreational facility open without distinction to any and all individuals irrespective of their beliefs and commitments, BSA has specified membership criteria--willingness to express a belief in God is fundamental, for instance. Participants meet regularly in small groups (often in private homes) that are designed to foster close relationships and trust. The BSA Mission Statement announces the organization's philosophy and purpose:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law:
>
> Scout Oath
>
> On my honor I will do my best, to do my duty to God and my country to obey the Scout Law; [t]o help other people at all times; [t]o keep myself physically strong, mentally awake, and morally straight.

Quoted in Dale v. Boy Scouts of America, 308 N.J. Super. 516, 524 (App. Div. 1998).

According to official BSA position statements, the duty to remain morally straight encompasses a commitment to refrain from sex outside of marriage. It also incorporates a view with respect to homosexuality, as set forth in a 1978 memorandum written by the national BSA:

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.
>
> Q. May an individual who openly declares himself to be a homosexual be a registered unit member?

> A. No. As the Boy Scouts of America is a private, membership organization, participation in the program is a privilege and not a right. We do not feel that membership of such individuals is in the best interests of Scouting."

Quoted in Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 735 n.7 (1998).

James Dale is a veteran New Jersey Boy Scout. About the time that he applied for adult membership and leadership status, he entered college, announced to friends and family that he was gay, and eventually became co-president of the Rutgers University Lesbian/Gay Alliance. In July, 1990, his open homosexual orientation and leadership in the Lesbian/Gay Alliance came to the attention of Scout leaders through a newspaper article in which he was interviewed in conjunction with a seminar he attended on issues relating to lesbian and gay teenagers. In the newspaper article--appearing in the *Newark Star-Ledger*--he was identified as co-president of the Rutgers Gay/Lesbian organization. Thereafter, the Monmouth Council of the BSA revoked Dale's BSA membership. A subsequent letter from the Council stated the grounds for his membership revocation: "[T]he standards for leadership established by the Boy Scouts of America . . . which specifically forbid membership to homosexuals." *Dale v. Boy Scouts of America*, 160 N.J. 562, 579 (1999). After receiving similar explanations from the assistant regional director of BSA's Northeast Region and BSA's national counsel, Dale declined to seek National Council review of the issue but, instead, brought a lawsuit challenging BSA's right to exclude him. The trial court rejected Dale's claim that New Jersey's Law Against Discrimination (LAD) applied to the Boy Scouts and prohibited them from barring someone from BSA leadership because of his sexual orientation. The court also found that the Boy Scouts' position with respect to active homosexuality was clear and BSA had a First Amendment right not to accept Dale as an adult leader. *Dale v.*

Boy Scouts of America, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995), I at 71.

The Appellate Division reversed and remanded for further proceedings, holding that BSA is a "place of public accommodation" subject to LAD and, therefore, Dale could not be denied the opportunity to be a volunteer assistant Scoutmaster based solely on his announced sexual orientation. The court also found that BSA did not have a First Amendment right to restrict membership according to sexual orientation. *Dale v. Boy Scouts of America*, 308 N.J. Super. 516 (App. Div.).

The New Jersey Supreme Court upheld the Appellate Division's ruling that BSA is subject to the provisions of the LAD and that applying those provisions does not infringe the Boy Scouts' First Amendment rights. *Dale v. Boy Scouts of America*, 160 N.J. at 624.

BSA now seeks this Court's review of the New Jersey Supreme Court's decision, on the ground that it denies the Boy Scouts basic federal constitutional protections. This amicus brief supports the Boy Scouts' petition of this Court for a writ of certiorari to review the ruling of the New Jersey Supreme Court.

SUMMARY OF THE ARGUMENT

A writ of certiorari is crucial because the First Amendment freedom undermined by the New Jersey Supreme Court is so fundamental to American liberty. The freedom at issue is the right of a voluntary organization such as BSA to dedicate itself to expressive purposes, to condition its membership policies so as to promote those purposes, and to be free from government reinterpretation or second-guessing of the details or implications of those purposes. BSA is every bit as much an expressive enterprise as was the St. Patrick's Day Parade whose right to exclude a contingent of openly gay marchers was upheld by this Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557

(1995). Indeed, *Hurley* explicitly says that the right to restrict membership enjoyed by the parade organizers was akin to a private club's right to exclude an applicant who did not adhere to the club's defining principles. *Id.* at 580-81.

The New Jersey Supreme Court has pronounced that BSA's fundamental principles do not include opposition to homosexuality, regardless of what BSA officials claim. Besides being a dubious contention in the face of significant evidence to the contrary, that court's pronouncement represents an impermissible judicial infringement on the right of a private expressive organization to define its own mission and principles. The First Amendment shields speakers from such government attempts to dictate--or to proscribe or edit--the speakers' chosen messages.

Denying a private expressive organization the right to define and abide by its own mission is a formula for undermining America's marvelous profusion of private associations. The widespread tendency to associate for purposes of social uplift, instruction, or advocacy was cited by Tocqueville as an especially healthy aspect of American society--a bulwark of liberty, in fact. In contrast, Tocqueville noted, some other nations prohibited private associations from being established unless their doctrines received governmental preapproval. In the United States, any such effort to force a stifling uniformity of thought on expressive organizations is barred by the First Amendment. Regardless of how one feels about the particular BSA policy that is challenged by Mr. Dale, vindicating the Scouts' right to adhere to their own vision is crucial for the rights of all private expressive organizations, of all outlooks, and for the larger cause of liberty in general.

ARGUMENT

I

A WRIT OF CERTIORARI IS NECESSARY BECAUSE THE NEW JERSEY SUPREME COURT'S RULING ASSAULTS A FUNDAMENTAL FIRST AMENDMENT RIGHT: THE FREEDOM OF PRIVATE EXPRESSIVE ORGANIZATIONS TO DEFINE THEIR OWN BELIEFS AND THE MEMBERSHIP POLICIES DESIGNED TO PROMOTE THOSE BELIEFS

A. The First Amendment Protects a Freedom of Expressive Association That Allows a Private Organization Dedicated to Expressive Purposes to Condition Its Membership Policies So as to Promote Those Purposes

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, this Court unanimously held that Massachusetts could not require organizers of a St. Patrick's Day Parade to admit a group that aimed specifically to "celebrate its members' identity as openly gay, lesbian, and bisexual descendants of Irish immigrants." The parade constituted "expressive activity" even if it lacked any "narrow, succinctly articulable message." *Id.* at 569, 578. Hence, to compel parade organizers, under terms of the state antidiscrimination law or any other statute, to accept "an expressive contingent with its own message" would violate the organizers' First Amendment rights. *Id.* at 580-81. This right of an expressive organization to align its membership with its message would be hollow if honored only so long as the message and the membership restrictions do not trigger controversy. "'[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.'" *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *cited in Curran v.*

Mount Diablo Council of the Boy Scouts, 17 Cal. 4th at 730 (Kennard, J., concurring).

Could state action to curtail an expressive association's membership restrictions be justified as promoting a larger goal --such as freeing society from unfounded biases? Not under the doctrine of the First Amendment. It shields the right of private expressive organizations to embrace positions regardless of their acceptability to popular sentiment. Government may not force such an organization to adopt contrary opinions--or membership policies reflecting contrary opinions--merely because an organization's views might be considered backward or unseemly by many or even most people.

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.

Hurley, 515 U.S. at 579. Even if one thinks the Boy Scouts are wrong in the policy at issue in this case, the Boy Scouts have a First Amendment right to be wrong.

B. BSA Is an Expressive Organization Enjoying the Same First Amendment Protection Accorded the Parade Organizers in *Hurley*

The *Hurley* Court found the annual St. Patrick's Day parade a protected expressive enterprise even though it lacked any "narrow, succinctly articulable message." It was enough that a "parade" generically is understood as "includ[ing] marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 567-68. The expressiveness of the Boy Scouts in a real sense is even clearer, because the Boy Scouts are founded on and celebrated for their "succinctly articulable message"--expressed in the Boy Scout Oath, along with other formulae.

Indeed, the New Jersey Supreme Court plainly acknowledges that the Boy Scouts have a guiding philosophy that they seek to impart: "We agree that Boy Scouts *expresses a belief in moral values* and uses its activities to *encourage the moral development* of its members. *Dale v. Boy Scouts of America*, 160 N.J. at 613 (citations omitted) (emphasis added). The Scouts are involved in "disseminat[ing a] message." *Id.* at 612.

Even though the New Jersey court as much as admits that the Scouts are an expressive enterprise, the court argues, in essence, that Scouts aren't expressive *enough*--they aren't sufficiently expressive to enjoy the First Amendment freedom accorded parade organizers. "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade." *Id.* at 623. Moreover, "Dale's status as a scout leader is not equivalent to a group marching in a parade" because "Dale does not come to Boy Scout meetings . . . to promote homosexuality, or any message inconsistent with Boy Scouts' policies." *Id.* at 623.

These assertions advance too narrow a reading of *Hurley*. Although a parade may be a uniquely public undertaking, and marching in a parade may be a more public form of expression than serving as a Scout leader, *Hurley* clearly envisions its principles applying to organizations that demonstrate their expressiveness in ways less public. The St. Patrick's Day parade could condition participation "*just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.*" *Hurley*, 515 U.S. at 581 (emphasis added). In the case at hand, Mr. Dale's views were made "manifest" through his leadership in the Rutgers Lesbian/Gay Alliance and his interview with a newspaper. *Dale*, 160 N.J. at 577-79. *Hurley* affirms the right of an organization such as the Boy Scouts to exclude someone manifestly at odds with a position they take.

C. The Boy Scouts' Right to Expressive Association Includes the Freedom to Define for Themselves the Content of Their Teaching, Free from Editing by the Courts

Although the New Jersey Supreme Court essentially acknowledges the Boy Scouts' status as an expressive association (*see, e.g., Dale*, 160 N.J. at 612), the court claims that the Boy Scouts' expressive message is not what Scout officials claim that it is. Contrary to Scout officials, the court says the BSA message includes nothing in opposition to homosexuality. For instance, the court denies that the "Scout Oath" pledge to be "morally straight," on its face, "express[es] anything about sexuality." *Id.* at 614.

Such an interpretation by the court runs counter to certain other Boy Scout documents. For instance, in litigation in California concerning Boy Scout membership policies, the Scouts

> introduced a memorandum written in 1978 by the National Boy Scouts of America setting forth--in question and answer form--the official position of the Boy Scouts relating to homosexuality and scouting. The document states in relevant part: "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader? A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in scouting are appropriate."

Curran, 17 Cal. 4th at 735 n.7.

More fundamentally, the New Jersey court is abridging the constitutional right of an expressive organization to control the contour of its creed. Freedom of speech is a nullity if government can edit or add to what the speaker wants to say. It is a "fundamental rule of protection under the First

Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

1. The New Jersey Court Would Impermissibly Force BSA into a Strident Advocacy of Its Tenets in Order to Win Them Judicial Recognition

The New Jersey Supreme Court suggests that the absence of explicit references to homosexuality in the Scout Oath defeats Scout officials' claim that BSA's governing philosophy includes a position on homosexuality. 160 N.J. at 614. The disturbing implication of such an interpretive approach is that the Scouts would have to be considerably more vociferous and strident on the issue of homosexuality in order for the court to accept that they indeed have a position on the subject. Yet stridency might itself be at odds with Scouting's precepts. Why must BSA be compelled to adopt such a tenor in order to be secure in its First Amendment freedoms?

Indeed, there is a constitutional tone-deafness in requiring that an organization shout the tenets of its creed in order for those tenets to be judicially recognized. "[P]rotected expression may also take the form of *quiet persuasion*, inculcation of traditional values, instruction of the young, ..." *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) (emphasis added).

The Boy Scouts have a right to adopt their own tenor and tone of expression without fear that modulating their institutional voice will deprive them of First Amendment freedoms.

2. A Court's Editing of an Expressive Organization's Ideology Is as Impermissible as Court Interpretation of a Religion's Doctrine

The New Jersey court makes much of the Boy Scouts' working relationship with various churches in order to justify its interpretation of Boy Scout teaching. To be specific, the court finds guidance in evidence that "the Boy Scouts' religious sponsors differ in their views about homosexuality." *Dale*,

160 N.J. at 615. What is ironic about the court's resort to religious doctrine in defense of its reading of Scout principles is that pronouncements on ecclesiastical teaching have generally been regarded as beyond the competence or constitutional authority of the judiciary. Inquiring "into the significance of words and practices to different religious faiths . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Widmar v. Vincent*, 454 U.S. 263, 284 (1981).

Just as it would be impermissible, under constitutional protections of religious freedom, for the courts to offer their own reading of how Catholics should understand the Nicene Creed, so the First Amendment right of a speaker to define her or his own message prohibits the court from correcting the Boy Scouts as to the meaning of Scouting's Oath or other fundamental formulae.

D. Denying the Boy Scouts the First Amendment Freedom to Determine Their Own Membership Would Carry Chilling Implications for Other Organizations With Expressive Purposes

In *Curran v. Mount Diablo Council of Boy Scouts*, 17 Cal. 4th 670, the California Supreme Court ruled that the Boy Scouts did not constitute a "business establishment" and so were not barred under California antidiscrimination law from denying a leadership post to an admitted homosexual.

Justice Kennard, in her concurring opinion, went further and addressed federal constitutional issues. Citing *Hurley*, she observed that any contrary decision would imperil First Amendment rights:

> Were we to hold that the membership decisions of the Boy Scouts of America are subject to regulation under [California civil rights law], the organization would have a compelling argument that requiring it to accept plaintiff, or anyone else who espouses views contrary to its guiding precepts, violates the First Amendment rights of expressive association and free speech enjoyed by the organization and its members.

Id. at 725.

Justice Kennard went on to point to some of the disturbing logical extensions of forcing the Boy Scouts to adopt membership criteria at variance with their institutional message.

> Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite? If the First Amendment protects the membership decisions of these groups, must it not afford the same protection to the membership decisions of the Boy Scouts?

Id. at 729. Contrariwise, if the Boy Scouts are denied such protection, is any organization with an expressive intent, no matter its position on the ideological spectrum, safe from the potential of government action to impose on it a different mission and altered ideology?

II

IN ADDITION TO ITS STATUS AS A CONSTITUTIONAL MANDATE, FREEDOM OF EXPRESSIVE ASSOCIATION MERITS DEFERENCE BECAUSE OF ITS IMPORTANT PRACTICAL ROLE IN PROMOTING LIBERTY

The freedom of expressive association that protects the Boy Scouts would merit deference purely for policy reasons, over and above its status as a constitutionally protected liberty. The practical benefit of fostering development of a multitude of private associations with diverse expressive purposes is famously noted by the Nineteenth Century French observer of American institutions, Alexis de Tocqueville. "Americans of all ages, all stations in life, and all types of disposition are

forever forming associations," wrote Tocqueville in a celebrated chapter of *Democracy in America*.

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types--religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute b ks, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, *if they want to proclaim a truth or propagate some feeling by the encouragement of a great example*, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Alexis de Tocqueville, *Democracy in America* 485 (J.P. Macer and Max Lerner, eds., Harper & Row, 1966) (emphasis added).

Tocqueville cited the instinct to associate not just as a boon for social welfare, but also as a force that tempered despotism or "omnipotence" of the majority--a "dike to hold back tyranny of whatever sort." *Id.* at 177.

In contrast, to force private associations to hew to some governmentally defined philosophy transforms such associations from islands of independence and engines of cultural diversity into the very opposite--agents of majoritarian uniformity. Tocqueville saw just such an oppressive tendency at work in his era, in the restrictive policies toward private associations on his native continent:

> In all European nations some associations cannot be formed until the state has examined their statutes and authorized their existence. In several countries efforts are made to extend this rule to all associations. One can easily see whither success in that would lead.

Id. at 662.

BSA, one of the most venerable of America's private associations, has been subjected to a government "examination" of its "statutes," to borrow Tocqueville's terms. The New Jersey Supreme Court has found the Scouts' own definition of those statutes--*i.e.*, of the Scouts' purpose and creed--to be wanting. The court has made bold to substitute its own interpretation of Scouting's mission. If this judicial overreach is allowed to stand, an expressive association's freedom to define its own message will have been dealt a crippling blow and the United States will have taken a long stride in the direction of those nations described by Tocqueville where private associations needed government preapproval of their message before they could formally be established.

Fortunately, the First Amendment prohibits such an assault on the freedom of expressive activity.

CONCLUSION

Defending BSA's right to adhere to the mission that it has set for itself is essential to guaranteeing that private expressive organizations in general may continue to flourish in all their diversity, and that a meaningful demarcation between the

public and the private sectors is maintained. Accordingly, Amicus asks this Court to review--and reverse--the ruling by the New Jersey Supreme Court that is so dismissive of a private association's First Amendment rights.

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Respectfully submitted,

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